

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

RODNEY N. TROUT,

Charging Party,

v.

UNIVERSITY PROFESSIONAL & TECHNICAL
EMPLOYEES, CWA LOCAL 9119,

Respondent.

Case No. LA-CO-95-H

PERB Decision No. 1582-H

January 13, 2004

Appearances: Werner Witke, for Rodney N. Trout; Schwartz, Steinsapir, Dohrmann & Sommers by Michael R. Feinberg, Attorney, for University Professional & Technical Employees, CWA Local 9119.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Rodney N. Trout (Trout) of a Board agent's dismissal of his unfair practice charge against the University Professional & Technical Employees, CWA Local 9119 (UPTE). Trout was an agency fee payer in a bargaining unit represented by UPTE.

The charge alleged that UPTE violated section 3587 of the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to make available its appropriately certified financial report within the 60-day statutory deadline.² Also before the Board for

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

²HEERA section 3587 provides:

Every recognized or certified employee organization shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees who are members of the organization, within 60 days after the end of

consideration is UPTE's request that the Board excuse its late filing of a response to Trout's appeal.

The Board agent rejected the unfair practice charge on grounds that the statutorily prescribed procedure for remedying an employee organization's failure to satisfy the requirements of Section 3587 is a petition to compel compliance, not an unfair practice charge. (Citing Service Employees International Union, Local 99 (Kimmitt) (1979) PERB Decision No. 106 (applying similar language under EERA); PERB Reg. 32125³.)

PERB Regulation 32125(a) specifies that a petition under Section 3587 may be filed by "any employee belonging to the organization." Although Trout was not a member of UPTE, the Board agent found that he could nevertheless petition to compel compliance with Section 3587, citing California Teachers Association and National Education Association (Link) (1981) PERB Order No. Ad-123 (Link). The Board in Link examined a nearly identical provision in EERA section 3546.5 authorizing "any employee within the organization" to

its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by the president and treasurer or comparable officers. In the event of failure of compliance with this section, any employee within the organization may petition the board for an order compelling such compliance, or the board may issue such compliance order on its motion.

³PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32125 was amended effective December 13, 2003 but retains the provisions pertinent to the issue before the Board. PERB Regulation 32125(e) is now PERB Regulation 32125(a). PERB Regulation 32125 states, in pertinent part:

(a) A petition to compel compliance with Government Code Section 3546.5 or 3587 may be filed by any employee belonging to the organization. A petition to compel compliance with Government Code Section 3515.7(e) may be filed by any employee in the unit. Such petition shall be filed in the regional office and shall include the names, addresses and telephone numbers of the exclusive representative, the employer, and the petitioning party.

petition the Board for an order compelling compliance. Noting that the Board in Link found this language “meant both members of the organization and agency fee payers,” the Board agent reasoned that fee payers like Trout could petition for compliance under Section 3587 as well.

The Board agent also noted that, in American Federation of State, County, and Municipal Employees, Local 2620, AFL-CIO (Cupp) (1987) PERB Decision No. 612-S (Cupp), the Board affirmed dismissal of an unfair practice charge alleging failure to make financial statements available and the Board affirmed referral of the charge allegations to the regional office for processing as a petition for compliance. Accordingly, the Board agent in this case dismissed the charge and stated that “the allegations regarding UPTE’s failure to comply with provisions of HEERA section 3587 will be treated as a petition for compliance, given an appropriate case number and reassigned to a new Board agent for processing.”

TROUT’S APPEAL

On appeal, Trout argues that his charge should have proceeded to a complaint and a hearing before an administrative law judge. Trout also opines that the Board should have investigated UPTE’s compliance with Section 3587 on its own motion.

UPTE’S RESPONSE

UPTE did not file a timely response to Trout’s appeal. UPTE has not shown good cause for the delay in filing. Therefore, UPTE’s request that the Board excuse its late filing is denied and the contents of that response have not been considered in this appeal.

DISCUSSION

Trout first argues that, under HEERA section 3587, UPTE must provide him with financial reports. The Board agent’s analysis is supported by long-settled Board precedent, articulated in Link, supra.

The Board in Link, reviewed the text in EERA section 3546.5 requiring an employee organization to make financial statements available to “employees who are members of the organization” and held that an employee organization is not obligated to make its financial statements available to nonmembers. The language at issue in Link is identical to the language from HEERA section 3587 that is at issue herein. Therefore, the Board affirms the Board agent’s determination that UPTE did not have a duty to make its financial records available to Trout under Section 3587.

However, we disagree with the Board agent’s reliance upon the Board’s decision in Link regarding a non-member employee’s right to petition for compliance with HEERA section 3587. That interpretation of Link holds that, while non-member employees do not have rights to receive financial reports under Section 3587, those employees may still pursue compliance with that section. It should be noted that the Link decision cited is a split decision, in which two Board members determined that David W. Link (Link), a non-member employee, had standing to petition for compliance; whereas, the other two Board members found that Link did not have such standing. The latter opinion is bolstered by the Board’s subsequent promulgation in 1982 of PERB Regulation 32125(e):

A petition to compel compliance with Government Code Section . . . 3587 may be filed by any employee belonging to the organization. [Emphasis added.]

“Belonging to the organization” clearly connotes membership. There is currently no Board decision otherwise interpreting the regulation. The Board’s decision in Cupp, cited by the Board, applies the financial record disclosure requirements of the Ralph C. Dills Act (Dills Act).⁴ The Dills Act requirements are clearly distinguishable from those requirements in

⁴The Dills Act is codified at Government Code section 3512 et seq.

HEERA and EERA.⁵ Dills Act section 3515.7(e) requires employee organizations to make financial records available to the Board and “to the employees in the unit.” (Emphasis added.) PERB Regulation 32125(a) states that a “petition to compel compliance under Government Code Section 3515.7(e) may be filed by any employee in the unit.” (Emphasis added.) In contrast, HEERA section 3587 requires employees to make financial records available only to employees “who are members of the organization,” and that a petition to compel compliance may be filed by “any employee within the organization.” (Emphasis added.) Moreover, the pertinent provision of PERB Regulation 32125(a) permits only employees “belonging to the organization” to file petitions to “compel compliance pursuant to Government Code Section 3546.5 or 3587.” (Emphasis added.)

As a result Trout, as a non-member, has no remedy under HEERA section 3587. However, as an agency fee payer, Trout is entitled to certain financial information under separate PERB regulations. Under Hudson v. Chicago Teachers Union Local No. 1 (7th Cir. 1984) 743 F.2d 1187 [117 LRRM 2314] and its progeny, agency fee payers may challenge the amount of fees deducted pursuant to a union security clause. (See also, Cumero v. Public Employment Relations Bd. (1989) 49 Cal. 3d. 575 [262 Cal.Rptr. 46], HEERA sec. 3543.5; and Subchapter 8, PERB regs., specifically, PERB regs. 32992, 32994-32997.) Under PERB Regulation 32992, the exclusive representative must, among other requirements, provide the nonmember with annual written notice of the amount of the agency fee, the basis for calculation of the reduced agency fee, and a procedure for appealing the fee, and must make available the independent audit forming the basis of the calculation. PERB Regulation 32997 makes it an unfair practice for an exclusive representative to collect agency fees in violation of these regulations. UPTE’s compliance with these regulations is not at issue here.

⁵EERA is codified at Government Code section 3540 et seq.

The Board “may also issue a compliance order on its motion” under HEERA section 3587, and under it’s plenary powers pursuant to HEERA section 3563(m). However, Trout has failed to allege any facts which would support such an action by the Board.

As an agency fee payer, Trout has adequate remedies under other provisions of HEERA and PERB regulations should he object to the calculation of agency fees or not receive the appropriate agency fee notice, issues not alleged in the charge. We therefore conclude that Trout’s charge regarding the claimed violation of HEERA section 3587 should be dismissed.

ORDER

The unfair practice charge in Case No. LA-CO-95-H is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.